No. 995

IN THE

Supreme Court of the United States

October Term, 1964

KENNECOTT COPPER CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellants submit this brief, pursuant to Rule 16, Paragraph 3 of the Rules of this Court, in opposition to plaintiff-appellee's Motion to Affirm.

STATEMENT

The facts set forth in appellant's Jurisdictional Statement are not challenged in the Motion to Affirm.

Nor is there any challenge to appellant's analysis showing that the district court decided this case by the application of a theory of *per se* illegality of vertical acquisitions, and of *per se* illegality of horizontal combinations involving 20% of a theoretical submarket, irrespective of how small a fragment of a true industry market is involved.

Rather, as we demonstrate below, the Motion to Affirm attempts to support the decision below by relying on as-

sertions of fact which are contrary to the evidence, and by ascribing to the district court factual and legal bases for decision which nowhere appear in the findings or opinion.

The government does not dispute the following facts stated in the Jurisdictional Statement with respect to the alleged paper insulated power cable "submarket":

a. At the time of the acquisition, Okonite's physical facilities were fast becoming obsolete (J.S. 5, 11-12*). It was losing out in the competitive race to lower cost, mass-produced items (J.S. 5, 11). Its venture into the mass-production market was unsuccessful (J.S. 13).

b. Okonite was unable to make 345 kv paper insulated power cable, which was soon to represent a very major type of cable. Nor could it satisfactorily manufacture certain large diameters of lower voltage paper insulated power cables (J.S. 12). Okonite needed large sums of money to re-equip its paper insulated power cable production facilities in order to survive (*ibid.*).

c. After the acquisition, Okonite incurred substantial operating losses (J.S. 6). It incurred them because of its inability to make the transition from a wartime and post-war economy to a peacetime economy, where its competitors were installing more modern equipment and making more modern, lower cost products (J.S. 5).

d. Before the acquisition of Okonite, the wire and cable subsidiary of Kennecott, KWC, had a small, old plant

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* As used herein, references and citations to "Tr." are to the transcript of trial, "GX" to the government's exhibits, "DX" to appellant's exhibits, "J.S." to the Jurisdictional Statement, and "M.A." to the government's Motion to Affirm.

which was badly located in Rhode Island (J.S. 6). Its principal products were telephone cable and magnet wire, neither of which was made by Okonite (J.S. 13).

e. KWC made and could make a small amount of only one of the four types of cables included in the alleged "submarket" of paper insulated power cables, *i.e.*, solid type in voltages from 1 kv to 27 kv (J.S. 7-8). At these voltages paper competes with other insulations, namely rubber and plastic (polyethylene) (J.S. 8-9). The majority of Okonite's sales of paper insulated power cables were of types other than the solid type made by KWC (J.S. 9).

f. The district court's finding of a violation of Section 7 in the paper insulated power cable "submarket" was based on just three facts:

(1) The combined market shares of the four largest companies (which did not include KWC) were about 90%;

(2) Okonite had 19.6% and KWC 2.1% of this so-called "submarket"; and

(3) The number of sellers was reduced by one (J.S. 10-11).

Nor does the government dispute, with respect to the refined copper line of commerce, the following facts stated in the Jurisdictional Statement:

a. Copper is an international commodity freely traded in a world market (J.S. 16). The amount of copper produced, both domestically and throughout the world, is constantly increasing due to the beginning of operations of new companies and the opening of new mines (*ibid.*).

b. Kennecott's share of domestic shipments of refined copper declined from 33% in 1954 to 20% in 1962 (*ibid.*).

c. Prior to the acquisition Okonite had bought its copper largely from foreign sources (*ibid.*), and its copper purchases represented only about 0.3% of 1958 free world supply and less than 1% of domestic shipments of refined copper (*ibid.*).

d. The extent of integration of major copper producers into copper fabrication has been declining, and has continued to decline since the Okonite acquisition (J.S. 20-21).

e. The facts contradict the district court's assumption that the Okonite acquisition may be followed by further acquisitions of wire and cable fabricators by major copper producers (J.S. 19).

1. The Companies Involved

Kennecott

In describing Kennecott's position in the wire and cable industry, the Motion to Affirm states that its subsidiary, KWC, "accounted for less than 2 percent of wire and cable sales . . ." (M.A. 3).

On the contrary, the government at trial conceded the correct statistics: KWC's total sales of wire and cable in 1958 were $13 million (DX 104), or less than 0.8% of total industry sales of $1,681 million (DX 87, p. 20, line 27).

The Motion to Affirm would also give the impression that KWC "was a viable, active competitor" in paper insulated power cables (M.A. 15), "expert in the technology, [and] familiar with the customers . . ." (M.A. 17).

On the contrary, plaintiff's own evidence is that KWC could make only a small amount of one of the four types of paper insulated power cables, *i.e.*, solid type in voltages from 1 kv to 27 kv (Tr. 395-397, 664), and did "not have adequate management, research, sales or production 'know how' " in the power cable field (GX 1, pp. 3-4).

In its brief to the district court after trial (p. 21), the government specifically argued that "KWC . . . lacked important technical and management 'know how' ", citing the same exhibit.

Okonite

The government would portray Okonite as a successful company at the time of the acquisition. The evidence was to the contrary. The lack of profits in 1958 (DX 11), and the subsequent losses of approximately $5,000,000 (DX 12-15, 100), fairly illuminate its financial condition at the time of acquisition. The fact that it had "an excellent name" (M.A. 4) is not responsive to the Jurisdictional Statement's showing that Okonite had obsolete physical facilities which were in large part the cause of its history of operating losses (J.S. 11-12).

Referring to Okonite as "the second largest independent company in the insulated wire and cable field" (M.A. 3-4) is wholly argumentative. It was stipulated to be the eighth largest producer of insulated wire and cable, with only 2.7% of domestic shipments (DX 94). This fact, plus Okonite's financial difficulties and obsolete plants and the insignificance of KWC, are part of the background of the district court's refusal to find that the acquisition had any effect whatever on competition in the stipulated line of commerce of insulated wire and cable.

As the question of competition in the insulated wire and cable market is no longer in issue, the semantics of "independent company" have become irrelevant. The size of Okonite is important only in the context of its being a purchaser of refined copper. Okonite was the eighth largest producer of insulated wire and cable, and as such it was a very, very much smaller purchaser of copper than the leading companies in the wire and cable industry (GX 470A), and very much smaller than the leading companies in other industries to which copper is sold as well.

With respect to the alleged "paper insulated power cable" submarket, the fact that Okonite's three principal competitors were subsidiaries of or closely affiliated with major copper producers has a significance which the government overlooks. The other three—Anaconda, Phelps Dodge and General Cable—were very successful, well financed companies with which Okonite would have to compete at a severe handicap because of Okonite's inferior physical equipment (Tr. 1116-1117, 2323-2325) and the lack of funds to establish competitive production facilities (Tr. 1204).

2. The Acquisition

The government seems to be saying (M.A. 6) that it was appropriate for Anaconda in 1922 to acquire a brass-fabricating subsidiary "to promote the sale and distribution of copper and brass products", and the government does not quarrel with Anaconda's 1929 acquisition of wire and cable fabricators or the 1930 acquisition of copper fabricators by Phelps Dodge. It complains only of Kennecott's very much smaller acquisition of Okonite. Yet, by this suit, the government would attempt to foreclose Ken-

necott from "promoting the sale and distribution of copper" by selling wire and cable, and competing with aluminum as the conductor metal for electrical wire and cable, even though the district court could find no adverse effect on competition in the wire and cable industry.

The Motion to Affirm is in error in stating that Kennecott chose external acquisition rather than internal expansion in order to "eliminate . . . competitive pressures" (M.A. 7). This is a comment of a third party which the government puts in the mouth of Kennecott (see Tr. 1164).

3. The Effect of the Merger Upon Competition

Despite the heading, this section of the Motion to Affirm does not discuss competition. The district court, applying rules of *per se* illegality, never discussed competition. The evidence, however, is that the acquisition did not threaten to lessen competition in any way.

Understandably unhappy with the findings and opinion below, the government ascribes to the district court new bases of decision. But the district court did not find that KWC was "a substantial fabricator of paper-insulated wire and cable" (compare M.A. 9 with J.S. 15a-17a) and it did not consider Kennecott's position as a copper producer as a factor in its decision with respect to the so-called paper insulated power cable "submarket" (compare M.A. 8-9 with J.S. 15a-17a).

The district court based its decision on the horizontal aspect of the case on only three facts: (1) Okonite was the third largest producer of paper insulated power cables with 19.6% of industry sales and KWC was eighth largest with 2.1%; (2) the four largest companies had roughly

90% of total sales; and (3) the number of sellers was reduced by one.

The Motion to Affirm states that KWC's market share "ranged from 2.1 percent to 3.4 percent" (M.A. 8) in the years preceding the merger; rather, according to the evidence, it ranged downward from 3.4% to 2.1% (GX 405). That the four leading companies increased their aggregate percentages between 1954 and 1962 was largely the result of a 4.4% increase in Anaconda's share of sales, rather than the result of combining the sales of Okonite and KWC (*ibid.*).

In discussing the refined copper line of commerce, the Motion to Affirm similarly finds it necessary to exaggerate the district court's opinion.

The district court did not find that "the merger had a not-insignificant effect on the refined copper line of commerce", or that it had any effect. The district court did not base its decision on any finding of actual foreclosure of a market to "small independent copper producers". It did not find that "independent fabricators were threatened with extinction through the competition of their own suppliers". On the contrary, the district court specifically rejected the government's contention that Kennecott favored its own fabricating subsidiaries over its independent fabricator customers. The independent customers represent 90% of Kennecott's copper sales to the wire and cable industry (GX 430, 471, Table 6), and the district court expressly found that "[I]f Kennecott were to discriminate against its [independent] wire and cable customers it would severely damage its own business" (J.S. 23a).

The Motion to Affirm asserts that Anaconda and Phelps Dodge, on the other hand, shipped most of their copper production to fabricating subsidiaries (M.A. 21), and the government seems to argue that the high degree of integration of Anaconda and Phelps Dodge should be remedied by requiring Kennecott to divest not only Okonite but also KWC, which Kennecott owned before the Okonite acquisition, so that Kennecott would be stripped of all wire and cable operations.

ARGUMENT

1. Paper Insulated Power Cables

The government argues that *United States* v. *Aluminum Company of America*, 377 U.S. 271, establishes a rule of *per se* illegality where, "in highly concentrated markets, dominated by a few companies but served also by a small, though diminishing, group of independents', the acquisition of one of the few significant remaining independents by one of the leading integrated companies violates Section 7" (M.A. 12-13).

This court has consistently held that mergers are not illegal *per se*, and that each must be viewed in the context of the particular industry involved. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321-22. Moreover, even the "rule" which appellee would read into *Alcoa* does not fit this case.

1. The district court did not find that KWC was "one of the leading integrated companies" in paper insulated power cables; in fact, it was the smallest and most negli-

gible producer of that product (GX 405, 471, Table 2), and certainly did not share in "dominating" the market. Moreover, the market involved in *Alcoa* was the very much larger market for aluminum wire and cable; here we are considering but a small fragment of a market: although sales of paper insulated power cables reached an abnormal high of $64 million in 1956, they were normally close to the $39 million of 1958 (GX 471, Table 2), or only 2.4% of total wire and cable industry sales of over $1,681 million in that year (DX 87, p. 20, line 27).*

The market is not unduly concentrated; the government's own expert testified that there is not enough business in very high voltage cables to support even the existing number of competitors (Tr. 2662). Okonite was not "eliminated" as a competitor. Rather, it was strengthened by Kennecott's money so that it could compete with General Cable, Anaconda and Phelps Dodge (Tr. 1116-1117, 2323-2325).

The evidence fully supports the conclusion that Okonite had exhausted its borrowing capacity (Tr. 1204), and that Okonite's future was "cloudy" at best (Tr. 1233), and the government itself argued to the district court (Brief After Trial, p. 21) that Okonite was handicapped by lack of financial resources.

The government argued below both (1) that overcapacity in the wire and cable industry was resulting in low profit margins, which in turn threatened the continued viability of independent fabricators, and (2) that combining Okonite and KWC eliminated potential expansion

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* KWC's sales represented 2.1% of that 2.4%, or 0.05% (GX 405).

by each of them. However, the government realized that its arguments were mutually self-defeating because, on its theory, if Okonite were to modernize and expand its facilities so that it could become competitive, and KWC were to build the new facilities it would need in order even to attempt to compete, there would be more overcapacity in the industry and, on the government's hypothesis, an even greater threat to the continued existence of the independent fabricators, including Okonite.

In this dilemma, the government argued that there was no fear of such an eventuality because Okonite really did not have the necessary financial resources, and KWC really did not have the necessary technical or management abilities (Brief After Trial, p. 21).

2. The Motion to Affirm, in attempting to justify the district court's finding that paper insulated power cables have the "practical indicia" of a separate submarket, proves instead the economic fallacy of combining the "solid type" paper insulated power cables manufactured by KWC, and "other types" of such cables which it did not manufacture, in the same submarket.*

a. KWC made only solid type paper insulated power cables (Tr. 395-397, 664). Okonite made solid type and the three other types as well (Tr. 397). Specialized machinery and special technical knowledge are necessary for the three other types (*ibid.*), and KWC had neither the requisite machinery nor

* The other three types of paper insulated power cables are (i) oil filled, (ii) gas filled and (iii) pipe types. For a more complete description see pages 7-8 of the Jurisdictional Statement.